



State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

AFSCME Local 1386, Portsmouth City Employees

Complainant

v.

City of Portsmouth

Respondent

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Case No: A-0411-58

Decision No. 2005-012

PRE-HEARING MEMORANDUM AND ORDER

BACKGROUND

AFSCME Local 1386, Portsmouth City Employees (hereinafter "the Union") filed an unfair labor practice complaint on November 24, 2004 alleging that the City of Portsmouth (hereinafter "the City") committed an unfair labor practice in violation of RSA 273-A:5 I (e) and (h) by failing to participate in good faith in the parties' contractual grievance procedure. More specifically, the Union indicates that on or about July 14, 2003 it filed a class action grievance against the City regarding the City's alleged use of temporary employees to perform cleaning services in the downtown area on nights and weekends ("Downtown Cleaning Grievance"). In said grievance, the Union alleged violations of Articles 1, 3.1, 3.4, 29.4, 29.7, and 29.9 by the City. The Union states that on or about July 23, 2004 it requested a list of arbitrators from the Public Employee Labor Relations Board (PELRB), in accordance with Article 20 of the parties collective bargaining agreement (CBA), after the grievance had been denied by the City at Steps 1 and 2. The Union acknowledges that the cover letter to the PELRB inadvertently referred to the grievance as "Class Action/Promotional By-Pass Utility Mechanic."

The Union alleges that thereafter, during the course of e-mail correspondence between the Steve Lyon's, the Union's staff representative, and Thomas Flygare, counsel for the City, Attorney Flygare indicated on or about September 14, 2004 that "[r]egarding PELRB A-0411-51, we have been unable to locate any record of a grievance (or decision by the City Manager at Step 2) that fits this description." According to the Union, after its counsel forwarded a "grievance packet" to Attorney Flygare on November 10, 2004 in an attempt to explain the confusion concerning the cover letter to the PELRB, Attorney Flygare responded on November 11, 2004 that the City was taking the position that the request for arbitration in A-0411-51 was not timely filed due to the inaccuracies in the letter of July 23, 2004. The Union claims that to date the City has not selected an arbitrator for this case and has therefore violated RSA 273-A:5 I (e) and (h).

As remedies, the Union requests that the PELRB (1) order the City to select an Arbitrator and proceed to arbitration on the "Downtown Cleaning Grievance;" (2) order the City to make the Union

whole for any and all costs and expenses incurred as a result of its pursuit of the instant prohibited practice charge; and (3) order any and all other relief as it deems necessary and appropriate.

The City filed its answer denying the Union's charge on December 15, 2004. In reference to the Request of Appointment of Arbitrator filed by the Union with the PELRB on or about July 23, 2004, the City avers that the Union described the grievance therein as "Class Action/Promotional By-Pass – Utility Mechanic." As to whether the description of the grievance was "inadvertent," the City states that it cannot admit or deny such allegation. It avers that the Union, through Staff Representative Lyons, referred to the grievance again as "Class Action/Promotional By-Pass" in an e-mail to Attorney Flygare on September 14, 2004. Although it acknowledges receipt of Attorney McClure's correspondence of November 10, 2004, the City states that Attorney McClure's letter was in fact prompted by the City's letter to the PELRB dated November 9, 2004 that stated in part: "Regarding Case No. A-0411-51, we have previously informed AFSCME that the City has no record of a grievance entitled "Class Action/Promotional By-Pass – Utility Mechanic" as described in AFSCME's letter to you dated July 23, 2004." Furthermore, while the City admits that it notified the Union on November 11, 2004 that it was considering Case No. A-0411-51 as not being timely filed due to the inaccuracies in the cover letter of July 23, 2004, it answers further that that the City put the Union on notice of this problem since at least September 14, 2004 and took no steps to address it. By way of further answer, the City states that the PELRB lacks jurisdiction over this charge, however it offers no further elaboration as to the basis for this position.

Accordingly, the City requests that the PELRB (1) dismiss the Union's unfair labor practice charge with prejudice; (2) order the Union to reimburse the City for its fees, expenses and lost time in responding to the counterclaim; and (3) grant such other relief that may be appropriate under the circumstances.

A pre-hearing conference was conducted before the undersigned hearing officer on February 2, 2005 at PELRB offices, Concord, New Hampshire.

PARTICIPATING REPRESENTATIVES

For the Union: Katherine M. McClure, Esq.

For the City: Daniel P. Schwarz, Esq. for Thomas J. Flygare, Esq.

ISSUES PRESENTED FOR BOARD REVIEW

- (1) Is the instant matter within the PELRB's jurisdiction and authority?
- (2) If so, does the City's refusal to proceed to arbitration on the "Downtown Cleaning Grievance" constitute an unfair labor practice under RSA 273-A:5 I (e) and/or (h)?
- (3) If so, what shall be the remedy?

WITNESSES

For the Union:

1. Steven Lyons, Staff Representative, AFSCME

For the City:

1. Dianna L. Fogarty, Human Resource Director, City of Portsmouth

Both parties reserve the right to amend their List of Witnesses in conformity with the schedule contained in the DECISION SECTION appearing at the conclusion of this order or, upon proper showing, later with reasonable notice to the other party. It is understood that each party may rely on the representations of the other party that witnesses appearing on their respective list will be available at the hearing.

EXHIBITS

Joint Exhibits:

1. Collective Bargaining Agreement
2. Arbitration Request form dated 7/23/04
3. Letter from Steven Lyons to PELRB dated 7/23/04
3. E-mails between Thomas Flygare & Steven Lyons dates 8/26/04, 9/9/04, 9/14/04, 9/15/04.
4. Fax from Katherine McClure to Thomas Flygare dated November 10, 2004. ("Grievance packet")
5. E-mails between Katherine McClure and Thomas Flygare dated November 10 and 11, 2004.
6. Fax from Thomas Flygare to Katherine McClure dated November 11, 2004.
7. Letter dated November 9, 2004 from Thomas Flygare to the PELRB.

For the Union:

1. None other than those marked as joint.

For the Town:

1. None other than those marked as joint.

Both parties reserve the right to amend their List of Exhibits in conformity with the schedule contained in the DECISION SECTION appearing at the conclusion of this order or, upon proper showing, later with reasonable notice to the other party. Copies of all exhibits are to be submitted to the presiding officer in accordance with Pub 203.02. It is understood that each party may rely on the representations of the other party that the exhibits listed above will be available at the hearing.

LENGTH OF HEARING

The time set aside for this hearing will be one-half (½) day. If either party believes that additional time is required, written notice of the need for additional time shall be filed with the PELRB at least twenty (20) days prior to the date of the evidentiary hearing.

DECISION

1. During the course of the pre-hearing conference, counsel present for the City was unable to articulate the basis for the City's assertion, in its answer, that the PELRB does not have

jurisdiction over the instant charge. If the City no longer intends to pursue this argument, counsel is directed to notify the PELRB and the Union's representative forthwith. Otherwise, counsel shall set forth its position as to the PELRB's jurisdiction, or lack thereof, in an appropriately filed pleading on or before **February 28, 2004**.

2. The parties' representatives shall meet, or otherwise confer, on or before **February 11, 2005** in order to compose a mutual statement of agreed facts. The parties' representatives shall memorialize those facts upon which they can so stipulate and file that document with the PELRB forthwith. If, after reaching stipulations, agreement is reached to submit the case by written submission, the parties shall forthwith file a joint statement indicating such agreement and include a proposed schedule for the parties' filings.

3. The parties shall file any additional preliminary, procedural or dispositive motions no later than **February 28, 2005**.

4. The party representatives shall forward any amendments to, or deletions from, their Witness and Exhibit lists, as detailed above, to the opposing representative or counsel, and to the PELRB, at least five (5) days prior to the scheduled hearing date. The party representatives shall meet, or otherwise arrange, to pre-mark any exhibits, for identification, prior to the time of hearing and have sufficient copies available for distribution at the hearing as required by Pub 203.02.

5. Unless otherwise ordered as a result of the filing of any subsequent motion or for other good cause shown, an evidentiary hearing between the parties will be held on:

March 15, 2005 @ 9:30 AM

at the offices of the Public Employee Labor Relations Board, Concord, New Hampshire.

So ordered.

Signed this 2nd day of February, 2005.



Peter C. Phillips, Esq.
Hearing Officer

Distribution:

Katherine M. McClure, Esq.

Thomas J. Flygare, Esq.